

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRENT C. NICHOLSON, *et al.*, ) No. C02-2441-JCC  
) No. C05-1181-JCC  
Plaintiffs, ) No. C06-1220-JCC  
)

vs. )

) ORDER

TOSCO CORPORATION, a/k/a/ TOSCO )  
REFINING CO., INC., foreign corporations, and )  
INTALCO ALUMINUM CORPORATION, a )  
foreign corporation, )  
Defendants. )

KENNETH N. EHLERS, *et al.*, )  
Plaintiffs, )

vs. )

CONOCOPHILLIPS, INC., a foreign corporation, )  
and INTALCO ALUMINUM CORPORATION, a )  
foreign corporation, )  
Defendants. )

JOHN J. VAN BUSKIRK, *et al.*, )

Plaintiffs, )

vs. )

CONOCOPHILLIPS, INC., a foreign corporation, )  
and INTALCO ALUMINUM CORPORATION, a )  
foreign corporation, )  
Defendants. )

1 This matter comes before the Court on the coordinated motions by Plaintiffs in the  
2 above-captioned cases for (1) consolidation of the three actions, (2) bifurcation of the *Nicholson*  
3 Plaintiffs' indemnification claim, and (3) alteration of the case schedule in *Van Buskirk et al. v.*  
4 *ConocoPhillips, Inc., et al.* (Dkt. Nos. 148, 50, 32.) The Court has carefully considered the  
5 motions, the Responses in opposition by Defendants ConocoPhillips, Inc. (Dkt. Nos. 152, 55,  
6 36) and Intalco Aluminum Corporation (Dkt. Nos. 153, 57, 37), Plaintiffs' Reply (Dkt. Nos.  
7 155, 59, 39), and the declarations and exhibits filed in support of those papers. Being fully  
8 advised, the Court has determined that oral argument is not necessary, and finds and rules as  
9 follows.

## 10 **I. BACKGROUND**

11 Plaintiffs allege the following:

12 Plaintiffs in all three actions all are or were (with one exception) owners of  
13 beachfront property located on the western side of Sandy Point peninsula. Sandy  
14 Point is located fifteen miles northwest of the city of Bellingham in Whatcom  
County, Washington, and juts about a mile into the Strait of Georgia. It also lies  
entirely within the exterior boundaries of the Lummi Indian Reservation.

15 Defendants ConocoPhillips and Intalco each own an industrial pier along the  
16 Strait of Georgia northward of Sandy Point. . . . Plaintiffs contend that these piers,  
17 and their associated aprons/staging areas, have altered the shoreline and interfered  
with the natural littoral drift of sediment toward Sandy Point, which in turn has  
18 caused the beach on or adjacent to Plaintiffs' respective properties to waste away,  
erode, or avulse. Plaintiffs in all three cases have all accordingly sued Defendants  
19 for negligence and all are ultimately seeking the same relief, in particular the  
restoration of the beach on the west side of Sandy Point.

20 *Van Buskirk* was filed in 2006 and is currently scheduled to go to trial in July.  
21 *Nicholson* and *Ehlers* were filed in 2002 and 2005, respectively, and are currently  
stayed pending the outcome of *United States v. Milner*, W.D. Wash. No. C01-  
22 0809, *appeals docketed*, Nos. 05-35802 and 05-36126 (9th Cir. Aug. 15, 2005  
and Nov. 28, 2005). *Milner* is an action brought by by [sic] the United States on  
23 behalf of the Lummi Indian Tribe against the *Nicholson* plaintiffs. The United  
States has alleged that the *Nicholson* plaintiffs' bulkheads and other shore  
defense structures are trespassing on tidelands owned by the federal government  
in trust for the Lummi Tribe. Thus, in addition to restoration of the beach, the

1        *Nicholson* plaintiffs are seeking indemnification from ConocoPhillips and Intalco  
2        for costs and damages associated with the defense of *Milner*.

3        (Pls.' Mot. 2--3 (Dkt. Nos. 148, 50, 32).) Plaintiffs argue that the cases involve the same claims  
4        against the same defendants based on the same facts, and therefore, the cases should be  
5        consolidated. They also argue that if their request for consolidation is granted, then the Court  
6        should bifurcate the *Nicholson* Plaintiffs' indemnification claim because that claim is separable  
7        from Plaintiffs' negligence and injunctive relief claims and should remain stayed pending the  
8        outcome of *Milner*. Finally, even if the Court declines to consolidate the actions, Plaintiffs ask  
9        that the Court alter the case schedule in the *Van Buskirk* action to accommodate their expert  
10       witnesses' health issues and the replacement of co-counsel. Defendants oppose the requests for  
11       consolidation. The Court will examine each of these requests in turn, below.

## 12       **II.     DISCUSSION**

### 13       A.   Consolidation

14       The Court may consolidate actions that "involve a common question of law or fact." FED.  
15       R. Civ. P. 42(a). The Federal Rules do not mandate that any cases be consolidated, however.  
16       Whether to consolidate is left to the district court's broad discretion. *See Investors Research Co.*  
17       *v. United States Dist. Court for Cent. Dist. of Cal.*, 877 F.2d 777, 777 (9th Cir. 1989). The  
18       district court weighs, among other things, "the saving of time and effort consolidation would  
19       produce against any inconvenience, delay, or expense that it would cause." *Huene v. United*  
20       *States*, 743 F.2d 703, 704 (9th Cir. 1984).

21       Defendant ConocoPhillips argues that, while in the "broadest sense," these cases involve  
22       similarly situated plaintiffs, the factual differences amongst the cases are significant. (Resp. 2  
23       (Dkt. Nos. 152, 55, 36).) In addition, Defendant argues that consolidation would cause jury  
confusion and unfair prejudice because (1) consolidation would add a dozen plaintiffs to an  
already complicated case, (2) consolidation would cause confusion over the statute of limitations

1 defenses, and (3) consolidation would cause confusion with respect to damages, which differ  
2 significantly amongst the Plaintiffs. (*Id.* at 7–10.) Defendant Intalco Aluminum Corporation  
3 raises similar arguments in opposition, also adding that the Court has already found the  
4 *Nicholson* and *Ehlers* negligence claims to be intertwined with the ultimate ruling in *Milner*.  
5 (Resp. 10 (Dkt. Nos. 153, 57, 37).)

6 The parties all appear to agree that the *Van Buskirk* case, alone, which involves  
7 approximately thirty plaintiffs, is complicated. (*See* Stephens Decl. ¶ 11 (Dkt. No. 51 at 4)  
8 (referring to “the sheer number of plaintiffs in the cases and technical complexity of the [*Van*  
9 *Buskirk*] case”).) The Court anticipates that the *Van Buskirk* trial will involve a significant  
10 amount of time and is not persuaded that adding two cases to that trial will preserve judicial  
11 efficiency, especially if doing so would require the bifurcation of the indemnity claim in the  
12 *Nicholson* case. Defendants have described in detail the ways in which consolidation may cause  
13 jury confusion, and the Court weighs these concerns in its decision today. While the Court  
14 recognizes that there may be a risk of inconsistent adjudications if each of the separate cases is  
15 tried before a jury, the Court is unwilling to further complicate an already complex trial by  
16 consolidating these three cases.

#### 17 B. Bifurcation

18 Plaintiffs’ request for bifurcation of their indemnification claim in the *Nicholson* case is  
19 contingent upon the Court’s granting of the motion to consolidate. As discussed above, the Court  
20 DENIES Plaintiffs’ request to consolidate. Accordingly, Plaintiffs’ request for bifurcation is  
21 DENIED as moot.

#### 22 C. Alteration of the *Van Buskirk* Case Schedule

23 The Court finds good cause to continue the trial date based on the *Van Buskirk* Plaintiffs’

1 expert witnesses' health issues and Plaintiffs' need to find replacement co-counsel. In addition, it  
2 appears that Defendant ConocoPhillips does not oppose a continuance. (Resp. 1 (Dkt. Nos. 152,  
3 55, 36).) Accordingly, the Court hereby vacates the July 6, 2009, trial date and SETS a new trial  
4 date of January 11, 2010, at 9:30 a.m.

### 5 **III. CONCLUSION**

6 For the foregoing reasons, the Court hereby GRANTS IN PART and DENIES IN  
7 PART Plaintiffs' motions (Dkt. Nos. 148, 50, 32) as follows:

- 8 (1) Plaintiffs' request for consolidation of the three actions is DENIED;
- 9 (2) Plaintiffs' request for bifurcation is DENIED as moot; and
- 10 (3) The Court vacates the July 6, 2009, trial date and SETS a new trial date of  
11 January 11, 2010, at 9:30 a.m. Proposed voir dire, jury instructions, and  
12 trial briefs are due by January 7, 2010. The pretrial order is due by  
13 December 31, 2009.

14 DATED this 2nd day of April, 2009.

15  
16   
17 John C. Coughenour  
18 UNITED STATES DISTRICT JUDGE  
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